108-267

IN THE

SUPREME COURT OF THE UNITED STATES.

BASKET
vs.
HASSELL. } No. 170.

To the Chief Justice and Associate Justices:

We ask for a rehearing on a single point involved in the opinion of the court—to wit:

> "As the gift was to take effect only upon the death of the donor, it was not a present *executed donatio causa mortis*, but a testamentary disposition, *void for want of compliance with the statute of wills.*"

The "gift" was executed in the State of Tennessee—the domicile of the donor—and whether it is to be held void as a testamentary disposition is to be determined by the law of that State.

We earnestly invite your attention to this inquiry.

The case shows that the indorsement and signature thereto of the certificate of deposit was made in the handwriting of Chaney; and the opinion admits that Chaney intended that Basket should have the money in the event of his death.

In Tennessee there is no statutory provision governing such a testamentary disposition—the principles of the common law being there in force.

Rev. Stat., Tenn., 1871, sec. 2162, *n*;
Suggett vs. *Kitchell*, 6 Yerger, 428.

> "The English law (says Kent) is very loose as to the nature of the instrument disposing of personal property; and marriage articles, promissory notes, assignment of bonds, letters, &c., &c., although not intended as wills, yet if they cannot operate in one way, may be admitted to probate as wills of personal property—provided, the intention of the deceased be clear that the instrument should operate after his death."
> 4 Kent, 518.

This is recognized to be the law of Tennessee in the case of *McLean* vs. *McLean*, citing the declaration of Lord Hardwicke:

> "There is nothing which requires so little solemnity as a will of personal estate, for there is scarcely any paper writing which the courts will not enforce as such."
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> 6 Humph., 452;
> *Watkins* vs. *Dean*, 10 Yerg., 321.

> "It is not to be doubted that a will of personal estate, if written in the testator's own hand, though it has neither his name or seal to it, *nor witnesses present at its publication* is effectual, provided the handwriting can be sufficiently proved."
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> 1 Roberts on Wills (1 Am. Ed.), p. 148;
> 2 Black. Com., 501; cited in *Suggett* vs. *Kitchell*, 6 Yerg., 428.

When, therefore, it is said that this disposition was void for want of compliance with the "*statute of wills*," it is evident that the court fell into an error, and this was probably induced by the decision of the judge below, as follows:

"His (Chaney's) domicile being in Tennessee at the time of his death, the laws of that State determine the succession to personal property. In construing the statutes of Tennessee relating to wills, the supreme court of that State has held that *nuncupative wills* must be made *in extrenis*. Section 2165 of the Tennessee Code declares that no *nuncupative will* is good, unless *proved by two witnesses present at the making thereof*, who were specially requested to bear witness to it by the testator. The endorsement on the certificate has never been probated as a testamentary instrument, according to the requirements of the laws of the State of Tennessee. It follows that the defendant, Basket, cannot claim the money as a testamentary gift."

Again:

"The indorsement was testamentary in character; *and if it had been properly executed, according to the statutes of Tennessee*, it doubtless might have been probated as the donor's will."

We do not controvert the statement, as applicable to a *nuncupative or verbal will*. But if it was supposed that it was at all applicable to the testamentary disposition in this case, a very remarkable mistake has been committed by the judge below.

It was necessary to pass upon the question whether Basket could claim the certificate as a testamentary disposition, in order to decree in favor of the complainant.

In his cross-bill, Basket asserts title to the certificate by virtue of its indorsement and delivery by Chaney and his subsequent death.

The answer to this is, that "this was not intended, and could not be effectual, as a gift *mortis causa*, nor a gift *inter vivos*; on the contrary, it was intended as a *testamentary disposition*. Wherefore and because, by the common

law of Tennessee, where said pretended indorsement was made, no such disposition of any personal estate can be made without a written will, *duly witnessed*, this defendant insists that no title to the certificate ever passed." (Rec., 15.)

If we have shown that there was here a good testamentary disposition, then the decree must be reversed.

Less than a month after the decease of Chaney, the bill is filed for the delivery to complainant of the certificate. This is resisted by defendant, by showing all the circumstances accompanying its indorsement and delivery. The court held there was neither a *donatio causa mortis* nor a valid testamentary disposition, and decreed accordingly that the money should be paid over to the complainant, Hassell. The case is the same as it would be if the sole question presented was as to the testamentary disposition.

The endorsement was urged by the complainant to constitute a testamentary paper. There was no question as to probate, even if the defendant was under any obligation to produce one.

Tarver vs. *Tarver*, 9 P., 179.

Were this the case of a complainant seeking relief on a will not probated, it would have been error in the court to have dismissed his bill absolutely.

Armstrong vs. *Lear*, 12 Wh., 175.

Respectfully submitted,

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W. HALLET PHILLIPS,
For Appellant.